

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-4184

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BUCHMAN, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

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ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Did the Securities and Exchange Commission err in holding, in an appeal from a disciplinary proceeding by the National Association of Securities Dealers, Inc., that the Association had properly found that a member firm which failed to complete a contract to purchase shares without equitable excuse for such breach violated the ethical standards of the NASD's Rules of Fair Practice?

2. Did the Commission err in upholding a fine against an officer of the member firm, where it found that he was aware of the failure to honor the contract and that he participated in a decision to purchase stock that was the subject of the contract from a different source, rather than honor the firm's contractual obligation?

3. Do the petitioners' vague assertions of prejudice on the part of the NASD and generalized complaints concerning the fairness of the

proceedings before the NASD and the Commission have any merit, where the petitioners were afforded ample opportunity to make a full presentation of their case?

4. Should the Court consider the actions of the Association with respect to other firms and individuals generally involved in the transactions, when the issue of the sanctions imposed on others was not raised before the Commission?

COUNTERSTATEMENT OF THE CASE

Preliminary statement

Joseph Buchman and Sidney Buchman have petitioned this Court, pursuant to Section 25(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a)(1), to review an order of the Securities and Exchange Commission entered on May 28, 1976 (Doc. 47, R 459-464), 1/ sustaining findings by the National Association of Securities Dealers, Inc. (NASD) (Doc. 36, R 415-421) that the Buchmans, as principals of Shaskan & Co., Inc. ("Shaskan"), an NASD member, had violated the NASD Rules of Fair Practice by failing to complete a contract with another NASD member. The Commission affirmed the sanction imposed on Sidney Buchman, a \$500 fine, but reduced the \$2000 fine levied by the NASD against Joseph Buchman to \$1,000. The Commission reviewed the NASD's actions pursuant to

1/ The record in this matter is cited as "Doc. ___, R ___," indicating the document number and record page number therein to which reference is made.

The Commission's opinion and order are set forth in the Documentary Appendix, infra, pp. 1a - 7a. The order was published in Securities Exchange Act Release No. 12492, 9 SEC Docket 775 (May 28, 1976).

Section 15A(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78o-3(g). 2/

Petitioners are appearing in this case pro se, and their brief is confusing. It includes a 21-page "Statement of the Facts," listing what is apparently a mixture of both their legal and factual differences with the Commission and NASD opinions. It also contains a one-page "Summary of Argument" stating, in a conclusory fashion, that neither petitioner violated an NASD rule. Attached to the brief are two letters, apparently intended as additional evidence in this matter. Nowhere do petitioners set out with any specificity either a chronology of the facts underlying this controversy, an explanation of the adjudicatory proceedings that have occurred, nor their argument and the legal basis for their petition.

The Facts Found by the NASD and by the Commission -- Petitioners' Transactions in The Stock of Crystalography Corporation

On October 5, 1972, Torpie & Saltzman, Inc. ("Torpie"), contracted to sell 300 shares of Crystalography Corporation stock to Shaskan for \$10.50 a share (Doc. 18, R. 290), and 200 shares of Crystalography Stock to Contemporary

2/ At the time the Buchmans applied to the Commission for review of the NASD's action, Section 15A(g) provided:

"If any registered securities association . . . takes any disciplinary action against a member thereof or any person associated with such member . . . such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such action has been taken or within such longer period as the Commission may determine."

Pursuant to the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), Section 15A(g) has been modified and redesignated as Section 19(d) of the Securities Exchange Act. For purposes of this case, the provisions of Section 19(d) are not substantively different from former Section 15A(g).

Securities, Inc. ("Contemporary"). These sales were executed through the brokerage facilities of John Muir & Co. ("Muir"). Contemporary then sold its 200 shares to Shaskan. 3/ Torpie, Shaskan, Muir, and Contemporary were all broker-dealers in securities and all were members of the NASD at that time.

Six days after these transactions, on October 11, 1972, the Securities and Exchange Commission suspended trading in Crystalography pursuant to Section 15(c)(5) of the Securities Exchange Act of 1934, 78 Stat. 574. See Securities Exchange Act Release No. 9815 (October 11, 1972) 4/ (Doc. 22, R. 295). The reasons stated in the Commission's release for the

3/ At the time this contract was entered into, and throughout the events involved in this proceeding, Joseph Buchman was vice-president, secretary, and operations officer of Shaskan. (Doc. 12, R. 186-187). Sidney Buchman was vice-president and manager of the trading department of Shaskan. (Doc. 12, R. 182).

The broker-dealer registration of Shaskan has subsequently been revoked, as a result of proceedings instituted by the Commission in which Shaskan consented to a finding, among others, of violations of the anti-fraud provisions of the Securities Act of 1933 and Securities Exchange Act of 1934. See Securities Exchange Act Release No. 11284, 6 SEC Docket 424 (March 10, 1975).

4/ At that time, Section 15(c)(5), 78 Stat. 574, provided:

"(5) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

This section was modified and redesignated by the Securities Acts Amendments of 1975, 89 Stat. 97, as Section 12(k), 15 U.S.C. 781(k). For purposes of this case, the provisions of Section 12(k) are not substantively different from former Section 15(c)(5).

trading suspension were rumors of financial problems on the part of brokers holding Crystalography stock, and the precipitous decline in the price of the stock from \$10.50 on October 6, 1972 to \$2.00 on October 9, 1972.

The settlement date for Shaskan's purchase of Crystalography stock was October 13, 1972, two days after the Commission entered its suspension order. Muir did not tender delivery on this date.

A series of trading suspensions continued until May 18, 1973, when the suspension was lifted by the Commission; see Securities Exchange Act Release 10156, 1 SEC Docket No. 16, p. 7 (May 17, 1973) (Doc. 24, R. 305 - 306). During the period that trading was suspended, Muir did not attempt to deliver the stock to Shaskan (Doc. 12 R. 103), but did ask Shaskan by telephone whether it would accept delivery. (Doc. 12, R. 134). Shaskan replied that it would not be accepting delivery until the suspension was lifted.

After the termination of the trading suspensions, on May 18, 1973, Muir attempted to deliver the Crystalography stock to Shaskan. (Doc. 12, R. 222). Shaskan again refused to accept the stock, purportedly in reliance (a) upon a Commission release issued several years earlier regarding completion of contracts for securities in which trading has been suspended, Securities Exchange Act Release 7920 (July 19, 1966) (Doc. 21, R 294-295), 5/

5/ Securities Exchange Act Release 7920 set forth the position of the Commission's former Division of Trading and Markets regarding completion of contracts for securities in which trading has been suspended. The release stated:

"It is the position of the Division that where the broker or dealer is himself acting in good faith, where he is not connected with the activity announced by the Commission as a basis for suspension pursuant to Section 15(c)(5) or Section 19(a)(4), and where he has no reason to believe that his customer is so con-

(footnote continued)

and (b) upon the language of the release issued concerning the Crystallography suspension. 6/

On May 18, 1976, Shaskan issued a written statement (Doc. 16, R. 288) declaring:

"We are not accepting trades of Crystallography Corp., at this time, until further clarification by the S.E.C. of its findings and as to what measures we must take to assure ourselves that we are not unknowingly consummating open contracts which may be in furtherance of a scheme to manipulate the price of the securities of Crystallography or would otherwise violate the federal securities laws."

Joel Buchman, counsel for Shaskan, telephoned a member of the Commission's staff requesting advice as to measures Shaskan might take and was advised to send a letter with the same request. (Doc. 35, R 378). This letter was

5/ (continued)

nected, no objection need be raised under such sections because the broker-dealer completes his contractual obligations in the particular transaction (e.g., by payment or delivery) while the suspension is still in effect. The Division believes that in each such case, however, he should inform his customer, prior to consummating the transaction, that trading in the security is suspended and of the reasons announced by the Commission for suspending trading.

"A broker-dealer, in deciding whether to consummate such a transaction, must of course consider not only the provisions of Sections 15(c)(5) and 19(a)(4) but also all other applicable provisions of the Federal Securities laws."

6/ Securities Exchange Act Release No. 10156, 1 SEC Docket No. 16 at p. 8, announcing the termination of the suspension of trading in Crystallography, included the following paragraph:

"The Commission also noted that it had been brought to its attention that there are unconsummated trades in [Crystallography] stock. In view of the allegation presented in the Crystallography release, broker-dealers should take the necessary measures to assure themselves that they are not unknowingly effecting a consummation of open contracts which may be in furtherance of a scheme to manipulate the price of the securities of Crystallography or would otherwise violate the Federal securities laws."

sent to the Commission on May 18, 1973 (Doc. 25, R. 307-308), to which the staff of the Commission responded on June 19, 1973 (Doc. 26, R. 309-311), specifying examples of "good faith" inquiries which might be made of persons initiating the Crystalography transactions to help Shaskan assure itself that the transactions in question were not tainted by fraud. None of these inquiries was ever made, either before or after the receipt of the staff letter. (Doc. 47, R. 461, infra at 3a; Doc. 12, R. 236).

At the time the Crystalography trading suspension was lifted, Shaskan, because of its impaired capital position, was in the process of delivering its accounts to another clearing broker under the supervision of the New York Stock Exchange. In early June, 1973, the staff of the Exchange directed Shaskan to clear up its uncompleted transactions. (Doc. 47, R. 461, infra at 3a). At that time, in addition to its contractual obligation to accept delivery from Muir, Shaskan owed Crystalography shares to customers who had purchased them prior to the suspension at approximately \$10.00 per share. The New York Stock Exchange did not indicate where Shaskan should purchase Crystalography stock to fulfill these obligations. (Doc. 12, R. 247). Sometime in June, 1973, prior to its receipt of the June 19th letter from the Commission (Doc. 26, R. 309-311), Shaskan purchased Crystalography stock on the open market for approximately \$1.00 per share for delivery to its customers. (Doc. 12, R. 199). Petitioners made no inquiries to determine whether these open market purchases might be in furtherance of a manipulative scheme.

On June 19, 1973, Shaskan was suspended from membership in the National Clearing Corporation (Doc. 12, R. 151) and on June 20, 1973, it was suspended from the New York, American and National Stock Exchanges. (Doc. 12, R. 152).

In July, 1973, it consented to the entry of a permanent injunction in an action brought by the Securities and Exchange Commission for violation of the net capital rule in which the court, among other things, ordered its complete liquidation. 7/

Shaskan never accepted the Crystalography shares it had purchased from Torpie or Contemporary prior to the trading suspension in October, 1972.

The Proceedings Below

Proceedings in this matter before the NASD were instituted on August 10, 1973 by Torpie, which filed a complaint with the NASD against Muir, Shaskan and its registered principals (including petitioners herein), and Contemporary and its registered principals (Doc. 3, R 6-19). The complaint alleged a violation of the NASD Rules of Fair Practice, Article III, Section 1, in that the respondents refused, without justification, to complete a trade by accepting delivery and paying for 500 shares of Crystalography stock. 8/ On August 13, 1973, Muir also filed complaints with the NASD against each of the other respondents named in the Torpie complaint, and alleging the same violations as did Torpie's complaint. (Docs. 4 and 5, R. 20-36).

On August 23, 1973, Shaskan filed its answer to both complaints. (Doc. 9, R 47-51). It denied that it had any trades with Torpie, and alleged that it had refused delivery of the stock in reliance upon the advice of

7/ Securities and Exchange Commission v. Shaskan Co., Inc. and Joseph Buchman, No. 2966 (S.D.N.Y., 1973); see Litigation Release Nos. 5969 (July 12, 1973) and 5972 (July 13, 1973). (Doc. 27, R. 312-320). This action did not concern any of the Crystalography transactions here in issue.

8/ Article III, Section 1 provides that "a member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." CCH NASD Manual, ¶2151.

its counsel and on the releases of the Securities and Exchange Commission. 9/ On August 17, 1973, Muir had filed its answer to the Torpie complaint, alleging that Muir sold 500 shares of Crystalography stock as agent for Torpie and that the trades were not completed because Shaskan refused delivery of the stock. (Doc. 6, R. 37-41).

A hearing before the District Business Conduct Committee ("District Committee") of the NASD was originally scheduled for March 7, 1974 (Doc. 11, R. 54-64), but was rescheduled at Shaskan's request for April 3, 1974 (Doc. 14, R. 273 - 274). On that date, the District Committee held its hearing, which was continued and concluded on May 15, 1974. (Doc. 12, R. 67-252). All of the parties were given timely notice of the hearing (Doc. 13, R. 253-272), at which Shaskan and its principals were represented by counsel. 10/ Joseph Buchman did not personally appear at the hearing; Sidney Buchman did appear and testified.

The District Committee found, in its decision dated June 28, 1974, (Doc. 28, R. 336-346), 11/ that Muir had adequately fulfilled its obligation to Torpie, but that Shaskan and Contemporary had no justification for refusing to accept delivery of the Crystalography shares and, hence, acted in a manner inconsistent with just and equitable principles of trade, in violation of Article III, Section 1, of the Rules of Fair Practice. The

9/ Contemporary had filed its answer on August 21, 1973, alleging that Contemporary could not honor its contract with Muir because Shaskan refused to accept delivery of the Crystalography stock. (Doc. 8, R. 45-46).

10/ See Doc. 12, R 217.

11/ A copy of the District Committee Decision is set forth in the Documentary Appendix, infra at 8a-18a.

District Committee censured Shaskan and Contemporary, suspending each for a period of 10 days. It levied a fine of \$2,000 against Joseph Buchman, and a fine of \$500 against Sidney Buchman. In addition it fined two of the principals of Contemporary \$1000 each. It also levied a fine of \$2000 against Meyer Buchman, another principal of Shaskan. All of the respondents appealed this decision to the NASD Board of Governors. (Doc. 29 - 30, R. 347 - 350).

A subcommittee of the NASD Board of Governors held a hearing on the matter on September 5, 1974 (Doc. 35, R. 357 - 414), at which both Joseph and Sidney Buchman personally appeared. On April 30, 1974, the Board of Governors rendered its decision, affirming the decision of the District Committee and affirming the penalties imposed on Shaskan and on Joseph, Sidney and Meyer Buchman. (Doc. 36, R. 415-421). 12/

Joseph Buchman notified the Securities and Exchange Commission on May 16, 1975, of his intent to appeal the decision of the Board of Governors on behalf of Shaskan and the Buchmans. 13/ (Doc. 46, R 458). Oral argument was not requested, and the Commission made its findings based on its independent review of the record certified by the NASD (Doc. 47, R 459, infra, at 1a). The NASD filed a brief (Doc. 45, R. 431-457) and Joseph Buchman filed a written statement in support of the application for review. (Doc. 42, R. 427-428).

In its Findings, Opinion and Order entered on May 28, 1976 (Doc. 47, R 459-464), 14/ the Commission set aside the NASD's findings and sanctions as

12/ A copy of the Decision of the Board of Governors is contained in the Documentary Appendix, infra at 19a-24a.

The Board of Governors also affirmed the penalties imposed by the District Committee on Contemporary but reduced the fines assessed against the two registered principals of that firm. (Doc. 36, R 420).

13/ Contemporary and its principals did not apply to the Commission for review.

14/ A copy of the Commission's Findings, Opinion and Order is contained in the Documentary Appendix, infra at 1a-7a.

to Meyer Buchman, 15/ but sustained the NASD's finding of misconduct by Joseph Buchman, Sidney Buchman, and Shaskan. The fine of \$2,000 levied against Joseph Buchman was, however, reduced to \$1,000, since the Commission determined that there was no violation with respect to the 200 shares purchased from Contemporary because Contemporary never tendered delivery of these shares, and because Joseph Buchman's conduct may have been predicated to some extent on advice of counsel. The \$500 fine levied against Sidney Buchman was sustained.

On July 22, 1976, Joseph and Sidney Buchman filed a petition for review with this Court. (Doc. 48, R 465).

STATUTORY SCHEME INVOLVED

Although Congress in 1934 provided for self-regulation of national securities exchanges when it adopted the Securities Exchange Act, Congress did not at that time extend this concept of self-regulation to brokers and dealers who operated exclusively in the over-the-counter markets. 16/ It recognized that "effective regulation of the exchanges requires as a corollary a measure of control over the over-the-counter markets," 17/ but

15/ The Commission held that these findings were not supported by sufficient evidence (Doc. 47, R 464), infra at 7a.

16/ The over-the-counter markets have been described as follows:

"Transactions in securities not taking place on an exchange are referred to as over-the-counter transactions. The over-the-counter markets, unlike the exchanges, have no centralized place for trading [A]ll registered broker-dealers are entitled to participate. The broker-dealers vary in size, experience, and function; the securities differ in price, quality, and activity."

Securities and Exchange Commission, 2 Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., 541 (1963).

17/ H. R. Rep. No. 1383, 73d Cong., 2d Sess., 15 - 16 (1934). See also S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934).

initially it left to the Commission the job of policing those markets. 18/
By 1938, however, Congress determined that qualified self-regulation of the
over-the-counter markets was appropriate. In considering how the over-the-
counter markets could most effectively be regulated, Congress stated
three major objectives:

"First, to protect the investor and the honest dealer alike from dishonest and unfair practices by the submarginal element in the industry; second, to cope with those methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market; and, third, to afford to the investor an economic service the efficiency of which will be commensurate with its economic importance, so that the machinery of the nation's markets will operate to avoid the misdirection of the nation's savings, which contributes powerfully toward economic depressions and breeds distrust of our financial processes." 19/

To attain these objectives, Congress adopted the Maloney Act, the primary purpose of which was to "provide for the establishment of a mechanism of regulation among over-the-counter brokers and dealers operating in interstate and foreign commerce or through the mails, [and] to prevent acts and practices inconsistent with just and equitable principles of trade" 20/
The mechanism chosen by Congress, as reflected in the Maloney Act, was "cooperative regulation, in which the task will be largely performed by

18/ See S. Rep. No. 1455, 75th Cong., 3d Sess., 4 (1938). See also Westwood & Howard, Self-Government in the Securities Business, 17 Law & Contemp. Probs. 518, 526 (1952).

19/ S. Rep. No. 1455, 75th Cong., 3d Sess., 3 (1938); H. R. Rep. No. 2307, 75th Cong., 3d Sess., 4 (1938).

20/ Act of June 25, 1938, C. 677, 52 Stat. 1070.

representative organizations of investment bankers, dealers, and brokers, with the government exercising appropriate supervision in the public interest, and exercising supplementary powers of direct regulation." 21/

The Maloney Act provides that, subject to certain conditions, "[a]n association of brokers or dealers may be registered [with the Commission] as a national securities association" 22/ As a matter of fact, the NASD is the only organization which has registered with the Commission. By its terms, the Act prohibits the Commission from registering an organization as a national securities association unless the association has adopted rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . and, in general,

21/ S. Rep. No. 1455, 75th Cong., 3d Sess., 4 (1938); H.R. Rep. No. 2307, 75th Cong., 3d Sess., 4 - 5 (1938). See also, Don D. Anderson & Co., Inc. v. Securities and Exchange Commission, 423 F. 2d 813, 814 (C. A. 10, 1970); Handley Investment Co. v. Securities and Exchange Commission, 354 F. 2d 64, 65 (C. A. 10, 1965).

Congress explicitly rejected the concept of leaving regulation solely in the hands of this Commission, for it recognized the limitations of direct governmental regulation engendered by limited staff, limited funds and, perhaps most importantly, the difficulties inherent in the government's attempt to define ethical and moral, as opposed to strictly legal, standards of conduct. As Mr. Justice Stewart stated, in dissenting in Silver v. New York Stock Exchange, 373 U.S. 341, 371 (1963):

"The purpose of the self-regulation provisions of the Securities Exchange Act, was to delegate governmental power to working institutions [stock exchanges and national securities associations] which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry."

22/ Section 15A(a) of the Securities Exchange Act, 15 U.S.C. 78o-3(a).

to protect the investors and the public interest" 23/ The Act also requires a registered national securities association to adopt rules which provide that members of the association shall "be appropriately disciplined, . . . by expulsion, suspension, . . . fine, censure . . . or any other fitting penalty, for any violation of its rule." 24/

The NASD's certificate of incorporation and by-laws reflect this Congressional directive. The third article in the NASD's certificate of incorporation states that one of the purposes to be carried out is to "adopt, administer and enforce rules of fair practice and rules to prevent fraudulent and manipulative acts and practices, and in general to promote just and equitable principles of trade for the protection of investors." 25/ Article VII, Section 1, of the NASD's by-laws authorizes its board of governors to adopt, from time to time for submission to the membership, rules of fair practice designed to "promote and enforce just and equitable principles of trade . . . and, in general, to protect investors and the public interest" 26/ It is pursuant to this authority that the NASD adopted rules to the effect that its members must, in the conduct of their business, observe high standards of commercial honor and just and equitable principles of trade." 27/

23/ Securities Exchange Act Section 15A(b)(6), 15 U.S.C. 78o-3(b)(6). When the Commission allowed the NASD to register with it as a national securities association, it found that the NASD's rules satisfied all the requirements of Section 15A. National Association of Securities Dealers, Inc., 5 S.E.C. 627 (1939).

24/ Section 15A(b)(9) of the Act, 15 U.S.C. 78o-3(b)(9). This section has been modified by the Securities Acts Amendments of 1975 and redesignated Section 15A(b)(7) of the Act.

25/ CCH, NASD Manual ¶1003.

26/ CCH, NASD Manual ¶1501.

27/ CCH, NASD Manual ¶2151.

The Commission has supervisory authority over the activities of national securities associations, including their disciplinary functions. But the Commission's role with respect to disciplinary action taken by a registered securities association against a member or a person associated with a member is a limited one. While the Commission may take additional evidence, it is specifically authorized to act on the basis of the record before the NASD and if the Commission affirms the Association's findings, it can then consider whether the sanction imposed is excessive or oppressive. If so, it can cancel, or otherwise reduce the sanction. 28/

The role of self-regulation in the securities industry is critical. Although it has had some weaknesses, Congress recently reaffirmed its viability. In its report on the Securities Acts Amendments of 1975, the Senate Committee noted:

"The self-regulatory roles of the exchanges and the NASD have been major elements of the regulatory scheme of the Exchange Act since 1934 and 1938, respectively. Although self-regulation has not always performed up to expectations, on the whole it has worked well, and the Committee believes it should be preserved and strengthened." S. Rep. No. 94-75, 94th Cong., 1st Sess., 23 (1975).

Accord, H.R. Rep. No. 94-123, 94th Cong., 1st Sess., 48 - 49 (1975). Thus, amendments were adopted generally giving the Commission supervision over the exchanges more comparable to that of the NASD.

28/ Section 19(e)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(e)(2).

ARGUMENT

The numerous points raised by petitioners appear to fall into four general categories. First, although they do not deny they had a valid contract with Muir, they assert that their failure to honor that contract was not inconsistent with fair and equitable principles of trade. (Br. 10-15, 17-23, 24). Second, petitioners claim that the finding of misconduct on the part of Sidney Buchman was incorrect, since they claim he did not participate in the decision not to honor the contract. (Br. 4-9, 14-15, 23-28). Third, the petitioners question the fairness of the proceedings, both before the NASD and before the Commission. (Br. 3, 8). Finally, petitioners raise various questions, which they did not raise before the Commission in its review of the NASD proceedings, concerning general NASD policy and the alleged disparity between the way the rules were enforced with respect to the Buchmans, as opposed to others involved in the Crystallography transactions. (Br. 4-5, 9, 15-16).

- I. THE COMMISSION'S FINDINGS THAT PETITIONERS BREACHED THEIR CONTRACT TO PURCHASE STOCK WITHOUT EQUITABLE EXCUSE OR JUSTIFICATION AND THAT SIDNEY BUCHMAN WAS ONE OF THOSE RESPONSIBLE FOR THIS VIOLATION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND, HENCE, ARE CONCLUSIVE.

Petitioners seek review of the Commission's decision pursuant to Section 25(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a)(1), which provides that "[a] person aggrieved by a final order of the Commission entered pursuant to this title may obtain review of the order . . ." in an appropriate United States Court of Appeals. The jurisdiction of the court of appeals, however, is limited -- Section 25(a)(4) of the Act, 15 U.S.C. 78y(a)(4), states that "[t]he findings

of the Commission as to the facts, if supported by substantial evidence, are conclusive." Substantial evidence in a Commission proceeding has been construed to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Archer v. Securities and Exchange Commission, 133 F.2d 795, 799 (C.A. 8, 1943), quoting Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938). See Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1954); NLRB v. Link-Belt Co., 311 U.S. 584, 597 (1941).

This limitation on a court's powers to review certain agency actions primarily reflects a recognition of the expertise that administrative agencies have in their particular areas of responsibility. See Republic Aviation Corp. v. Board, 324 U.S. 793, 800 (1945). It also reflects the practical consideration that "[t]he consequences of a different rule would be that the court might be flooded by appeals of this kind. . . ." Bates & Guild Co. v. Payne, 194 U.S. 106, 108 (1904).

This is not to suggest that this Court may look only at the evidence which supports the Commission's findings. On the contrary, the entire record may — and should — be viewed to determine whether there is substantial evidence to support the Commission's action. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1954). Nonetheless, this Court has pointed out that "it is important to remember that the Commission is charged with the duty of enforcing the statute in the 'public interest,' a mandate which necessarily 'gives the Commission broad discretion.'" Berko v. Securities and Exchange Commission, 316 F.2d 137, 141 (C.A. 2, 1963). Therefore, the factual findings of the Commission are not to

be disturbed unless they are clearly erroneous. New York Trust v. Securities and Exchange Commission, 131 F.2d 274 (C.A. 2, 1942).

A. Petitioners Failed to Honor Their Contract

In a case factually similar to the instant case, this Court has affirmed an order of the Commission upholding NASD sanctions imposed on a member for breaching a contract for sale of stock in the absence of any equitable excuse or justification. Nassau Securities Service v. Securities and Exchange Commission, 348 F.2d 133, 135 (C.A. 2, 1965), affirming, 42 S.E.C. 445 (1964). There is no dispute in this case that Shaskan had a valid contract with Muir for the purchase of 300 shares of Crystalography stock. (Doc. 18, R 290). Petitioners also concede that they breached this contract by failing to accept delivery.

It is not the function of the Commission, nor of the NASD, to adjudicate private contractual disputes between members of the Association. But the Commission is properly concerned with the ethical implications of the conduct of those in the securities business, regardless of the extent of any harm inflicted on another person. 29/ Although a breach of contract between NASD members is of no concern to the NASD or to the Commission if such breach does not contravene the ethical standards embodied in Article III, Section 1 of the NASD Rules of Fair Practice, 30/ the Commission has previously held that failure to honor a contract does violate the Rules of Fair Practice when unethical or dishonorable, or without equitable excuse or justification. 31/

29/ Ben R. Reuben, Securities Exchange Act Release No. 12944, 10 SEC Docket 847, 848 n. 7 (November 2, 1976).

30/ See note 8, supra at 8.

31/ Lerner & Co., 37 S.E.C. 850, 855 (1957); Samuel B. Franklin & Co., 38 S.E.C. 113, 116 (1957); Mutual Funds Service of Florida, Inc., 42 S.E.C. 1035, 1039 (1966); M.S. Wien & Co., 42 S.E.C. 894 (1966).

B. There is Substantial Evidence to Support the Commission's Findings that Petitioners did not have a Reasonable and Honest Belief at the Time of Refusal that the Transactions were Part of a Fraudulent and Manipulative Scheme.

The Commission has held that a refusal to complete a contract based on a reasonable belief that a transaction was part of a manipulative scheme does not violate Article III, Section 1. ^{32/} Petitioners, of course, rely on this holding (Br. 15). But, to justify a refusal to honor a contract, the belief that a transaction is part of a manipulative scheme must be honest and reasonable at the time of refusal. ^{33/}

The burden of establishing that petitioners had a reasonable belief that the transactions in question were part of a manipulative scheme is on the petitioners. Charters & Co. of Miami, Inc., et al., 43 S.E.C. 175, 178 (1966). The Commission has held, and this Court has affirmed, that a mere suspicion of fraud is not a sufficient basis to refuse to honor an obligation to a fellow NASD member. ^{34/}

The Commission agrees that its releases announcing the suspension and resumption of trading in Crystalography were warnings that the Commission suspected fraud and manipulation with respect to that stock. This does not mean, however, that every Crystalography transaction was tainted by fraud. Although, as the Commission stated in lifting the trading suspension, brokers were required to "take the necessary measures to assure themselves" that transactions in Crystalography would not be

^{32/} Southern Brokerage Company, 42 S.E.C. 449 (1964).

^{33/} Nassau Securities Service v. Securities and Exchange Commission, supra at 135.

^{34/} Id. at 135; see 42 S.E.C. at 448.

in furtherance of a manipulative scheme, 35/ the Commission's release did not state that all Crystalography transactions involved price manipulation, and did not in itself provide any justification for a broker's failure to honor its contractual obligation. As the Commission noted in its Opinion at p. 4, infra at 4a, (Doc 47, R. 461A):

"[The Releases] did not give broker-dealers carte blanche to disregard their contractual obligations; rather, it stressed the need for due care in determining whether or not consummation of Crystalography transactions might be in furtherance of a manipulative scheme."

There is substantial evidence in the record to sustain the Commission's finding that petitioners had no reasonable grounds to believe that the specific transactions which Shaskan failed to complete were tainted with fraud. Joseph Buchman, in his testimony before the Board of Governors of the NASD, admitted that there were no discussions with other parties to the transactions in order to determine the presence of fraud or manipulation. (Doc. 35, R 379). In the hearing before the NASD Conduct Committee, counsel for Shaskan stipulated that none of the steps suggested to Shaskan in the letter written by a Commission staff member in response to its inquiry were ever taken. (Doc. 12, R. 236). These steps suggested consideration of the following factors (Doc. 26, R 310):

- (1) whether the customer was in fact the beneficial purchaser or seller;
- (2) the source of the stock;

35/ Securities Exchange Act Release No. 10156, 1 SEC Docket No. 16, p. 10 (May 17, 1973) (Doc. 24, R 306).

- (3) whether the customers placed the orders or someone else placed orders for them and the circumstances surrounding each trade;
- (4) whether anyone suggested that the customer buy or sell the stock, and the identity of such person; and
- (5) whether the customer was purchasing and/or selling the stock as part of a concerted action with other persons or broker-dealers.

In fact, the record reflects no factual basis for petitioners' purported belief that the transactions were part of a manipulative scheme, nor does it show even one affirmative step by Shaskan or the petitioners to ascertain if there were any factual basis for its professed suspicions.

The Commission stated in its opinion (Doc. 47, R. 462; infra at 5a) that it was not appropriate under the circumstances for petitioners to refrain from making inquiries about the Crystalography stock of the persons with whom they had dealt. In this connection, it noted that Shaskan had been a member of the NASD since 1940, that Joseph Buchman became associated with the firm in 1961, and that Sidney Buchman became associated with the firm in 1958. In light of the petitioners' lengthy experience in the securities business, the Commission determined that at least some of the general suggestions set forth in the staff's letter should have been evident to petitioners. Nevertheless, petitioners took no measures at all to determine if the contracts in question were in any way manipulative.

Petitioners had been aware of their contractual obligation to Muir since October 5, 1972, when Shaskan agreed to buy the stock. If they really believed that they would require guidance from the Commission's staff on how to assure themselves that these transactions were not tainted with

fraud, they had no need to wait until May 18, 1973 -- more than seven months after the contract was made -- to seek such guidance. Muir had asked Shaskan by telephone during the suspension whether it would accept delivery (Doc. 12, R 134). There was no reason to believe that Muir would not tender delivery when the suspension was lifted. Nor can petitioners allege that they were unaware, prior to the May 18, 1973, release lifting the suspension in Crystalography trading, of the Commission's policy relating to trading in suspended securities. 36/

Finally, when Shaskan was ordered by the New York Stock Exchange in June 1973, to clear up its customer accounts, Shaskan had outstanding orders from customers for Crystalography shares. These purchases were made prior to the trading suspension at about \$10.00 per share. The New York Stock Exchange did not indicate where Shaskan should purchase Crystalography stock to fulfill its obligation. Shaskan chose to purchase Crystalography shares in the open market at \$1 a share, for delivery to customers at \$10 a share, rather than accept delivery of stock from Muir pursuant to its contractual obligation to purchase at \$10.50 a share. Petitioners took no steps to ascertain whether these open market transactions were in furtherance of a manipulative scheme. The Commission properly took consideration of the petitioners' variable ethics -- one

36/ In its notice to all NASD members dated Dec. 27, 1972 (Doc. 15, R 285-287), the NASD outlined the provisions of Securities Exchange Act Release No. 7920 (July 19, 1966) (Doc. 21, R 294). See supra, p. 5, n. 5. Petitioners should have been made aware by this notice of the applicable policy, if they were not previously so aware, and had no apparent reason to wait until May to ask the Commission for advice if they really felt it was necessary.

standard for \$10 purchases, another for \$1 purchases -- in evaluating their defense. (Doc. 47, R. 461, infra at 3a). 37/

In their brief, petitioners discuss at length their assertion that they were unable to accept delivery after June 20, 1973, when Shaskan was in liquidation. (Pet. Br. 22-23). These contentions are irrelevant, however, since the Commission's opinion was based on Shaskan's unjustified refusal to take delivery on May 18, 1973 (Doc. 47, R. 462, infra at 5a):

"In view of our conclusion that Shaskan did not have reasonable grounds for its failure to honor the Crys-

37/ Petitioners have attached to their brief two letters addressed to Shaskan and Joseph Buchman, one from the New York Stock Exchange dated June 15, 1973 and the other from the Securities and Exchange Commission dated June 22, 1973. Although these letters do not specifically relate to the Crystalography transactions here in issue and would therefore appear to be irrelevant, petitioners apparently intend them to clarify the nature of the New York Stock Exchange and Securities and Exchange Commission directives to Shaskan. It is not appropriate, however, for this Court to consider these letters. Section 25(a)(5) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a)(5), sets forth the standards by which a party may adduce evidence before the Court that was not before the Commission:

"If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order."

Petitioners have not applied to the Court for leave to adduce this additional evidence; since these letters were mailed to Joseph Buchman in June, 1973, however, there appears to be no reasonable ground for petitioners' failure to have adduced them.

talography trade on May 18, 1973, we need not reach the question of whether its failure to act on the suggestions in our staff's letter of June 19 was without equitable excuse or justification. However, we do not believe that the federal district court order issued on July 10, 1973, which required Shaskan's self-liquidation, precluded applicants from following the suggestions enumerated in our staff's response to applicants' inquiry. Although applicants contend that they were not permitted to expend any funds to investigate the Crystalography situation, there is nothing in the record to indicate that the necessary inquiries would have been particularly costly or that the question of costs was ever specifically raised with the members of our staff who were involved with Shaskan's liquidation."

C. There is Substantial Evidence to Support the Commission's Finding that Sidney Buchman was one of those Responsible for the Violations of Article III, Section 1 of the NASD Rules of Fair Practice

Petitioners allege (Br. 8) that no violative act was committed by Sidney Buchman and that he is being penalized solely for his position as trading manager, vice president, and director of Shaskan. In this connection, they assert (Br. 4-5) that Sidney Buchman did not know on what grounds Shaskan refused to accept delivery of the Crystalography stock, that he was first informed of the refusal after the fact, and that he had no duty to encourage the completion of open contracts. These contentions are meritless.

Article III Section 1 of the NASD Rules of Fair Practice was applicable to Sidney Buchman as an officer and director of Shaskan, a member firm of the NASD. 38/ The record reflects, through Sidney Buchman's

38/ Article I, Section 5(a) of the NASD Rules of Fair Practice provides:

"These Rules of Fair Practice shall apply to all members and persons associated with a member. Persons associated

(footnote continued)

testimony, that although he did not participate in the initial decision not to accept delivery of the Crystalography shares from Muir (Doc. 12, R 183), he learned of this decision when an unidentified broker called him to ask for an explanation of the notice Shaskan distributed to broker-dealers stating that it was not accepting trades in Crystalography (Doc. 12, R 183). At that time, Sidney Buchman had discussions with others at Shaskan and was apprised of the facts (Doc. 12, R. 84).

The Commission held in its opinion that as a vice president and director of Shaskan, Sidney Buchman "had some degree of responsibility for resolving the problems arising from the uncompleted transactions once he was aware of the situation." (Doc. 47, R 464; infra at 7a). But when he learned of the uncompleted transactions, the record is devoid of any indication that he urged that the firm honor its contractual obligations, or that he asked his fellow principals what factual basis they had for believing that the transactions in question were part of a scheme to manipulate the price of Crystalography. He did not himself question Muir to determine if the transactions were tainted with fraud, either before or after the receipt of the letter from the staff of the

38/ (continued)

with a member shall have the same duties and obligations as a member under these Rules of Fair Practice."

CCH NASD Manual ¶2005. The term "person associated with a member" is defined by the NASD by-laws to include officers and directors. CCH NASD Manual ¶1103.

Commission (Doc. 12, R. 67-252). 39/

Sidney Buchman, however, was not found to be liable for violations of the NASD Rules merely because he failed to act when he learned that his company was not honoring its contractual obligations. Rather, he participated in the decision to purchase shares of Crystalography in the open market at \$1.00 per share to supply to customers who had purchased the stock at \$10.00 per share (Doc. 12, R 194), while he knew that Shaskan already had a contract to purchase such shares from Muir. Although he had been told that the reason for not honoring the contract with Muir was that counsel for the firm had sought guidance from the Commission on how to determine whether the Muir transactions were in furtherance of a manipulative scheme, he made no inquiries to determine whether the open market transactions were part of any such scheme. (Doc. 47, R 461, infra at 3a; Doc. 12, R 228, 236; Doc. 35, R 379). This is substantial evidence supporting the Commission's finding that Sidney Buchman's conduct in failing to honor the Muir contract was without justification and was in violation of Article III, Section 1 of the

39/ The Commission has held in a number of cases that a principal of a brokerage firm has a responsibility to see that the firm is operated in conformity with applicable laws and rules, even in cases where he was unaware of the conduct in question. See, Reynolds & Co., 39 S.E.C. 902, 916; Sutro Bros. & Co., 41 S.E.C. 443, 463; Dunhill Securities Corporation, 44 S.E.C. 472, 476; Jerome H. Shapiro, Securities Exchange Act Release No. 12615, 10 SEC Docket 10 (July 12, 1976). Even a person who is not registered as a "principal" of a firm but whose participation brings him within the definition of the term "principal" has been held to be jointly responsible for all aspects of an NASD member firm's business. Samuel A. Sardinia, Securities Exchange Act Rel. No. 12392, 9 SEC Docket 505 (April 29, 1976).

NASD Rules. The fact that Sidney Buchman was not involved in the original decision not to accept delivery of the shares is reflected in the sanctions the Commission imposed, as Sidney Buchman was fined \$500, as against the fine imposed on Joseph Buchman of \$1,000.

II. PETITIONERS' COMPLAINTS ABOUT THE FAIRNESS OF THE PROCEEDINGS BEFORE THE NASD AND BEFORE THE COMMISSION ARE WITHOUT LEGAL OR FACTUAL BASIS.

A. The Proceedings Before the NASD were in Compliance with the Securities Exchange Act of 1934 and the NASD Code of Procedure for Handling Trade Practice Complaints.

Petitioners state (Br. 3) that the NASD acted with prejudice in accepting the filing of Torpie's complaint, and that the NASD hearing was similar to a "kangaroo court." These allegations not only lack legal and factual basis but are also not properly before this Court. Section 25(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(c)(1), provides:

"No objection to an order or rule of the Commission, for which review is sought under this Section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."

Petitioners did not raise any of the above issues before the Commission nor do they state any grounds for this failure in their brief. Accordingly, they should not be considered by this Court. Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F.2d 461, 468 (C.A. 2), certiorari denied, 361 U.S. 896 (1959). ^{40/} In any event,

^{40/} Cf., Lile v. Securities and Exchange Commission, 324 F.2d 772, 773 (C.A. 9, 1963); Gearhart & Otis, Inc. v. Securities and Exchange Commission, 348 F.2d 798, 800 (C.A.D.C., 1965).

the NASD proceedings fully complied with the NASD Code of Procedure for Handling Trade Practice Complaints ("Code"), 41/ and with the governing statutory provision, Section 15A(h)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78o-3(h)(1).

Petitioners apparently complain (Br. 3) that they were prejudiced by the fact that only Sidney Buchman appeared and testified before the District Committee. Petitioners apparently feel that Sidney Buchman's knowledge of the transactions in issue in the NASD proceedings was insufficient for him to have testified adequately concerning Shaskan's actions before the Committee. Joseph Buchman told the Board of Governors, by way of explanation for his failure to appear, that "your delay and tardiness made it impossible for me to attend the hearing" (Doc. 35, R 371); as noted supra, however, the hearing date had been postponed at the request of the petitioners. (Doc. 14, R 283-284). In any event, Joseph Buchman was given timely notice of the date of the hearing (Doc. 13, R 259) and did not request any further extension. Moreover, both

41/ CCH NASD Manual ¶¶3001-3026. See especially the following provisions of the Code which were applicable to and were observed in the proceedings before the NASD: Section 4, prescribing the form of complaint filed with the District Committee; Section 8, providing for hearings before the District Committee upon request; Section 9, specifying the format for such hearings; Section 11, requiring the District Committee to render a written decision; Section 15(a), providing for review of the District Committee decision by the NASD Board of Governors; Section 16, specifying the standards for the review by the Board of Governors; and Section 20, providing, as does Section 15A of the Securities Exchange Act of 1934, that a person aggrieved by final NASD action may apply to the Commission for review.

Petitioners do not point to any failure on the part of the NASD to observe the procedural requirements of their Code.

petitioners appeared personally before the Board of Governors, which held its own hearings and conducted a de novo review of the District Committee proceedings.

Petitioners' allegations of a conspiracy between the NASD and Torpie are inappropriate, not only because no factual basis for such allegations appears on the record, but also because, as this Court has previously held in R. H. Johnson & Co. v. Securities and Exchange Commission, 198 F.2d 690, 695 (C.A. 2, 1952), it will

"consider any errors in the proceedings of the association only if and to the extent that they infected the Commission's action by leading to errors on its part."

There is no suggestion as to how any NASD error might have infected the Commission's action here.

B. The Commission's Order and Opinion was Issued in Compliance With Applicable Law.

Petitioners also raise various procedural objections to the Commission's action: (1) that there was no "hearing" or oral argument (Br. 1, 8); 42/ (2) that they were never informed that a hearing and oral argument had been denied (Br. 2, 8); (3) that Sidney Buchman was not given an opportunity to present an adequate defense in writing (Br. 8); and (4) that petitioners were not informed of the Commission's findings (Br. 1, 8).

42/ Petitioners' reference to a "hearing" does not appear intended to mean a procedure for taking further evidence in the matter; rather, the term appears to be used synonymously with "oral argument." See Br. 1, 8. In any event, Commission rules provide that no one is entitled to adduce additional evidence before the Commission unless there are reasonable grounds for failure to adduce the evidence before the NASD. Rule 15Ag-1(e), 17 CFR 240.15Ag-1(e).

As to the lack of hearing and oral argument, Section 19(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(e)(1), provides that the review by the Commission of a final disciplinary sanction imposed by the NASD may consist solely of consideration of the record before the NASD and the opportunity for submission of written statements. No request for a hearing or oral argument appears in the record. Even if such a request had been made, the Commission had the discretion to deny it and to decide petitioners' application for review on the basis of the record filed by the parties, without such procedures. 43/ Further, the letter, dated May 29, 1976, from George A. Fitzsimmons, Secretary of the Commission, to Mr. Joseph Buchman (Doc. 40, R 425) enclosed a copy of Securities Exchange Act Rule 15Ag-1, 17 CFR 240.15Ag-1, and specifically directed petitioners' attention to the procedures of paragraph (f) for requesting oral argument. Thus, petitioners cannot allege ignorance of the rule.

Sidney Buchman also claims (Br. 8) that he was not given an opportunity to present an adequate defense in writing. The statement filed by petitioners in support of their application to the Com-

43/ Securities Exchange Act Rule 15Ag-1, 17 CFR §240.15Ag-1, specifies the procedure by which an applicant may request oral argument before the Commission, and provides that:

"The Commission in its discretion may grant or deny any . . . request [for oral argument], and where it deems it appropriate to do so the Commission will grant or deny an application on the basis of the papers filed by the parties, without oral argument."

mission (Doc. 42, R 427) was signed only by Joseph Buchman and Meyer Buchman. 44/ The fact that Sidney Buchman did not sign the statement, however, does not mean he lacked an opportunity either to sign the statement or to file his own brief or statement.

Joseph Buchman submitted a letter to the Commission on May 21, 1975 (Doc. 46, R 458), announcing his intention to appeal the NASD decision on behalf of Shaskan, Meyer Buchman, Sidney Buchman, and Joseph Buchman. In accordance with Commission regulations, 45/ Joseph Buchman and Meyer Buchman submitted their statement on June 27, 1965. (Doc. 42, R 427-428). Since Sidney Buchman did not sign it, the Commission could have treated the application as abandoned by Sidney Buchman, pursuant to the provisions of Rule 15Ag-1(c). 46/ It did not do so, however, but gave consideration to the validity of the NASD findings as to Sidney Buchman, as well as to the others. 47/

Finally, petitioners allege (Br. 1, 8) that the Commission never informed them of its findings. Since the Commission's decision

44/ That statement, however, did include the argument that "[t]he penalties against Sidney Buchman should be rescinded since he had nothing to do with the operations of Shaskan & Co., Inc." This is, in essence, the same argument that Sidney Buchman raises before this Court, an argument that was considered and explicitly rejected by the Commission in its decision. See infra at 7a.

45/ See Securities Exchange Act Rule 15Ag-1(c), 17 CFR 240.15Ag-1(c).

46/ 17 CFR 240.15Ag-1(c).

47/ It may be that Sidney Buchman's failure to sign the statement was inadvertent, as petitioners state in their brief: "The SEC is also confused as to appearances: if Joseph Buchman and Meyer Buchman appeared then Sidney appeared too since he signed the very same documents as they did." Br. 8.

was mailed for service on June 2, 1976, and since the Buchmans signed and filed a Petition for Review with this Court on July 22, 1976, this contention is clearly groundless.

III. WHATEVER ACTIONS THE NASD TOOK WITH RESPECT TO OTHER PARTIES INVOLVED IN THE CRYSTALOGRAPHY TRANSACTIONS WITH SHASKAN HAVE NO RELEVANCE TO THIS CASE AND ARE NOT PROPERLY BEFORE THIS COURT.

In their brief, petitioners seek to raise a melange of additional matters which do not appear to have been raised before the Commission, including (1) why Torpie's complaint did not name the principals of Muir, whereas it did name the principals of Shaskan and Contemporary (Br. 3), and (2) whether the court should direct the SEC to state publicly what petitioners perceive as a "new policy of the NASD" regarding the consummation of securities transactions (Br. 9). 48/ In addition, they raise a series of irrelevant questions with respect to the conduct of the other brokers involved in the Crystalography transactions, and the possibility that either Muir or Torpie have engaged in some form of misconduct (Br. 15-19). 49/

As we have noted, however, (p. 27, supra) Section 25(c)(1) of the Securities Exchange Act provides that petitioners' failure to raise these matters before the Commission, in the absence of

48/ This request is accompanied by the observation that petitioner "is not debating the correctness of this decision, at present it is not his concern."

49/ In this regard, petitioners point out that Torpie was charged with securities law violations by the Commission in June, 1974, and is thus "not such a clean brokerage house in this matter or in other matters of a similar nature." Id. at 16.

reasonable grounds for that failure, precludes their being considered on review. In any event, these contentions are wholly without merit. The question before this Court is not whether Muir or Torpie acted consistently with the NASD's Rules of Fair Practice, but whether the Commission's finding that petitioners did not so act is supported by substantial evidence. As we have seen, the Commission's findings are supported by the evidence, and are, therefore, conclusive.

CONCLUSION

For the foregoing reasons, the order of the Commission under review should be affirmed.

Respectfully submitted,

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November 1976

* Linda W. Jarett, a May 1976 law school graduate, assisted in the preparation of the Commission's brief.

DOCUMENTARY APPENDIX

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 12492 / May 28, 1976

Admin. Proc. File No. 3-4684

In the Matter of the Application of

SHASKAN & CO., INC.
New York, New York
and
JOSEPH BUCHMAN
MEYER BUCHMAN
SIDNEY BUCHMAN

For Review of Disciplinary Action Taken by the

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

FINDINGS, OPINION AND ORDER MODIFYING ACTION OF REGISTERED SECURITIES
ASSOCIATION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY
PROCEEDINGS

Violations of Rules of Fair Practice

Failure to Honor Contract

In proceedings for review of disciplinary action by registered securities association, association's findings of violation by member and two of its principals based on member's failure to honor a trade sustained; but association's finding of violation by member's president set aside, since another principal had assumed responsibility for the transaction in question and president was unaware of it; and sanction imposed on one principal reduced, since association's findings were based in part on a non-violative transaction, and principal may have relied on advice of counsel.

APPEARANCES:

Joseph Buchman and Meyer Buchman, for applicants.

Lloyd J. Derrickson, Andrew McR. Barnes, and Joseph G. Reimer, III, for the National Association of Securities Dealers, Inc.

This is an application by Shaskan & Co., Inc. and three of its principals, Joseph, Meyer, and Sidney Buchman, for review of disciplinary action taken by the National Association of Securities Dealers, Inc. ("NASD"). 1/ The NASD found that applicants violated Article III, Section 1 of the NASD's

1/ Applicants filed a written statement in support of their application for review, and the NASD filed a brief with us. Oral argument was not requested. Our findings are based upon an independent review of the record certified to us by the NASD.

SECURITIES & EXCHANGE COMM.
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Rules of Fair Practice 2/ in that the firm failed to honor purchases of securities from other members. The NASD censured applicants, suspended Shaskan's membership in the Association for ten days, and fined Joseph Buchman \$2,000, Meyer Buchman \$1,000, and Sidney Buchman \$500. It also assessed costs against each of the individual applicants. 3/

On October 5, 1972, Torpie & Saltzman, Inc., a complainant in this proceeding, sold, through John Muir & Co., another complainant, 300 shares of common stock of Crystalography Corporation to Shaskan and 200 shares of Crystalography stock to Contemporary Securities Corporation. Contemporary then sold its 200 shares to Shaskan. On October 11, 1972, prior to the settlement dates of these transactions, we suspended trading in the securities of Crystalography. The suspension was not terminated until May 18, 1973, when Muir attempted without success to effect delivery of the Crystalography shares to Shaskan and Contemporary. Contemporary based its refusal to accept delivery of the shares it had purchased on Shaskan's failure to honor its contractual commitment to purchase these shares from Contemporary. Shaskan, in refusing to accept any shares from Muir, asserted reliance on the releases we had issued concerning the Crystalography suspension, and on Securities Exchange Act Release No. 7920. 4/ Its position was that it could not then assure itself that the transactions were

2/ Article III, Section 1 requires that a member, in the conduct of its business, shall observe "high standards of commercial honor and just and equitable principles of trade."

3/ Each was assessed a one-fifth share of the total costs of \$625.49. The other two-fifths were assessed against two other respondents in the proceeding who have not applied to us for review.

4/ That release, issued on July 19, 1966, set forth the position of our former Division of Trading and Markets regarding completion of contracts for securities in which trading has been suspended. The release said:

"It is the position of the Division that where the broker or dealer is himself acting in good faith, where he is not connected with the activity announced by the Commission as a basis for suspension pursuant to Section 15(c) (5) or Section 19(a) (4), and where he has no reason to believe that his customer is so connected, no objection need be raised under such sections because the broker-dealer completes his contractual obligations in the particular transaction (e.g., by payment or delivery) while the suspension is still in effect. The Division believes that in each such case, however, he should inform his customer, prior to consummating the transaction, that trading in the security is suspended and of the reasons announced by the Commission for suspending trading.

"A broker-dealer, in deciding whether to consummate such a transaction, must of course consider not only the provisions of Sections 15(c) (5) and 19(a) (4) but also all other applicable provisions of the Federal securities laws."

The Crystalography trading suspension was announced in Securities Exchange Act Release No. 9815 (October 11, 1972), and its termination was announced in Securities Exchange Act Release No. 10156 (May 17, 1973). The latter release included the following paragraph:

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not part of a fraudulent and manipulative scheme, and that it would not accept any Crystalography shares until clarification by the Commission of its findings with respect to that company and of the measures Shaskan should take to assure itself that the transactions were not tainted with fraud. It telephoned a member of our staff requesting such clarification and was advised to send a letter. Its counsel did so on May 18, 1973, and our staff responded by letter dated June 19, 1973. The staff's reply specified certain examples of "good faith" inquiries which might be made of persons initiating the Crystalography trades in order to help Shaskan assure itself that these transactions did not involve violations of the federal securities laws. None of these inquiries was made, either before receipt of the staff letter or thereafter.

By the time the Crystalography trading suspension was lifted, Shaskan, because of its impaired capital position, was in the process of delivering its accounts to another clearing broker under supervision of the New York Stock Exchange, of which Shaskan was a member. In early June 1973, the staff of the exchange directed Shaskan to clear up its fails with respect to customer transactions. At that time Shaskan owed Crystalography shares to customers who had purchased them prior to the October 1972 suspension for about \$10 a share. Prior to its receipt of the June 19 staff letter, Shaskan purchased Crystalography stock in the open market for approximately \$1 per share in order to satisfy these obligations. It made no inquiries to determine whether these open market purchases were part of a manipulative scheme.

On or about June 20, 1973, Shaskan was suspended from membership in the National Clearing Corporation and the New York, American, and National Stock Exchanges. In July 1973, it consented to the entry of a permanent injunction in which the court, among other things, ordered its complete liquidation. 5/ Shaskan never accepted the Crystalography shares it had purchased from Torpie & Saltzman or Contemporary prior to the trading suspension in October 1972.

As we have previously recognized, it is not our function, nor that of the NASD, to adjudicate private contractual disputes between members of the Association. 6/ Rather, our concern in cases of this kind is whether NASD members have adhered to the ethical standards embodied in Article III, Section 1 of the Association's Rules of Fair Practice. We have held that a failure to honor a contract violates that rule only if it appears that such failure was unethical or dishonorable, or if it was without equitable excuse or justification. 7/ And, in applying these standards, we have said

4 Continued/

"The Commission also noted that it had been brought to its attention that there are unconsummated trades in Crystalography stock. In view of the allegation presented in the Crystalography release, broker-dealers should take the necessary measures to assure themselves that they are not unknowingly effecting a consummation of open contracts which may be in furtherance of a scheme to manipulate the price of the securities of Crystalography or would otherwise violate the Federal securities laws."

5/ See Litigation Release Nos. 5969 (July 12, 1973) and 5972 (July 13, 1973).

6/ Lerner & Co., 37 S.E.C. 850, 855 (1957); Samuel B. Franklin & Company, 38 S.E.C. 113, 116 (1957).

7/ Samuel B. Franklin & Co., supra; Lerner & Co., supra.

that a refusal to complete a contract based on a reasonable good faith belief that a transaction was part of a manipulative scheme does not violate the rule. 8/

Applicants rely on that holding. They assert to us, as they argued to the NASD, that our release of May 17, 1973 announcing the termination of the Crystalography trading suspension was a "glaring warning signal" that we strongly suspected fraud and manipulation with respect to that company's securities. They say that they were unable to assure themselves that the transactions into which Shaskan had entered were untainted with fraud; that by the time they received a letter from our staff Shaskan's affairs were under the control of regulatory authorities, including this Commission; and that Shaskan could not settle fails and pay monies owed to broker-dealers without our permission and until other matters of assertedly higher priority had been cleared up.

The NASD contends that neither our releases relating to the Crystalography suspension nor Securities Exchange Act Release No. 7920 9/ constituted, in themselves, adequate justification for Shaskan's refusal to complete its contracts, and that Shaskan bore an affirmative burden to make appropriate inquiries in order to ascertain whether or not the transactions in question were in fact part of a manipulative scheme. In the absence of such efforts, the NASD argues, Shaskan's beliefs regarding fraud, even if they were held in good faith, did not have a reasonable basis at the time of its failure to honor its contractual commitments. Hence, the NASD believes that applicants' conduct was inconsistent with the ethical standards which the Association's rule requires of its members.

We agree with the NASD that an unsupported suspicion of fraud does not constitute an "equitable excuse or justification" for the failure to complete a contract; such a belief must have been both honest and reasonable at the time of refusal if we are to find that the NASD's rule was not violated. 10/ In the Southern Brokerage case, 11/ we found that a member of the Association had an adequate factual basis for its suspicion of manipulation. In this proceeding we are called upon to decide whether our Crystalography trading suspension and, in particular, our release announcing its termination, 12/ provided sufficient grounds for applicants' refusal to accept Crystalography shares, and, if not, whether applicants had any other reasonable basis for their actions.

Based on our review of the record, we believe that applicants' reliance on Southern Brokerage is misplaced. They are right in characterizing our 1973 Crystalography release as a glaring warning signal that we suspected fraud and manipulation. But that signal did not give broker-dealers carte blanche to disregard their contractual obligations; rather, it stressed the need for due care in determining whether or not consummation of Crystalography transactions might be in furtherance of a manipulative scheme.

8/ Southern Brokerage Co., 42 S.E.C. 449 (1964).

9/ See note 4, supra.

10/ Nassau Securities Service v. Securities and Exchange Commission, 348 F.2d 133, 135 (C.A. 2, 1965), affirming 42 S.E.C. 445 (1964).

11/ Note 8, supra.

12/ See especially the paragraph in Securities Exchange Act Release No. 10156 quoted in note 4, supra.

Applicants do not seem to have recognized this obligation. From October 1972, when trading in Crystalography securities was suspended, until May 1973, when the suspension was terminated, they made no inquiries which might have helped them resolve any suspicions they may have had. When the Crystalography stock was tendered after the suspension was lifted, they contented themselves with a request to our staff for guidance. And they did not thereafter follow the suggestions contained in our staff's written response.

On this record, we are unable to conclude that applicants had reasonable grounds to suspect that the specific transactions which Shaskan failed to complete were tainted with fraud. We do not believe it was appropriate under the circumstances for applicants to refrain from making inquiries about the Crystalography stock from the persons they had dealt with pending receipt of a letter from our staff. 13/ And if they really believed that such guidance was necessary, the need for it could have been anticipated well before the termination of the trading suspension. 14/ Finally, in evaluating the defense asserted by applicants, we note that when Shaskan was directed by the New York Stock Exchange to clear up its fails in early June 1973, it chose to purchase Crystalography shares in the open market for delivery to customers rather than accepting the delivery of stock from complainants. 15/ As noted above, no steps were taken in connection with those open market transactions to ascertain whether or not they were in furtherance of a manipulative scheme. 16/

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- 13/ Applicants were not novices in the securities business. Shaskan became a member of the NASD in 1940, and Meyer, Joseph, and Sidney Buchanan became associated with that firm in 1946, 1961 and 1958, respectively. Thus, at least some of the general suggestions set forth in our staff's letter as examples of measures that might be taken should have been evident to applicants themselves.
- 14/ Although the NASD found that no violation occurred prior to May 18, 1973, when Muir attempted to deliver the Crystalography stock to Shaskan upon termination of the trading suspension, applicants had been aware of Shaskan's contractual commitments since October 1972 and had no reason to believe that the firm would not ultimately be called upon to consummate those trades.
- 15/ The exchange's staff did not specifically direct Shaskan how to clear up its fails or where to acquire the Crystalography stock which it was required to deliver to customers.
- 16/ In view of our conclusion that Shaskan did not have reasonable grounds for its failure to honor the Crystalography trade on May 18, 1973, we need not reach the question of whether its failure to act on the suggestions in our staff's letter of June 19 was without equitable excuse or justification. However, we do not believe that the federal district court order issued on July 10, 1973, (see note 5, supra) which required Shaskan's self-liquidation, precluded applicants from following the suggestions enumerated in our staff's response to applicants' inquiry. Although applicants contend that they were not permitted to expend any funds to investigate the Crystalography situation, there is nothing in the record to indicate that the necessary inquiries would have been particularly costly or that the question of costs was ever specifically raised with the members of our staff who were involved with Shaskan's liquidation.

The NASD appears to have based its findings and penalties on Shaskan's refusal to honor both of its contractual commitments -- one for 300 shares which Muir attempted to deliver on behalf of Torpie & Saltzman, Inc., and the other for 200 shares which Shaskan had purchased from Contemporary Securities Corporation. However, the record does not reveal any attempt on the part of Contemporary to effect delivery to Shaskan of the 200 shares Shaskan had agreed to purchase. ^{17/} Based upon the NASD's view that a violation of Article III, Section 1 of its Rules of Fair Practice takes place only when a refusal is preceded by a bona fide attempt to deliver, we think that the Association's findings of violation with respect to the 200-share transaction must be set aside.

As for the 300-share transaction, it is not necessary to reach the issue, nor does the record before us enable us to do so, of whether the transaction was in fact part of a fraudulent scheme. ^{18/} We conclude only that applicants failed to satisfy their burden of demonstrating that there were reasonable grounds for the firm's failure to complete it. ^{19/} Accordingly, we concur with the NASD's finding that such failure violated Article III, Section 1 of the Association's Rules of Fair Practice.

Applicants argue that Meyer and Sidney Buchman had no responsibility for the operations of Shaskan, and that if any penalties are assessed against the individual applicants, they should only be imposed on Joseph Buchman who made all of the decisions in connection with the Crystallography transactions. As noted above, the NASD fined Joseph Buchman \$2,000. In view of the fact that we have set aside the NASD's findings with respect to the 200-share transaction, and because Joseph Buchman's conduct may have been predicated to some extent on the advice of counsel, ^{20/} we believe it appropriate to reduce the fine imposed on him to \$1,000.

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We note that Joseph Buchman testified that no contracts have been honored by Shaskan with any brokers since June 20, 1973, based on advice given by our staff. He also asserts that our staff set up a list of priorities with respect to Shaskan's liquidation and that, as of the date of applicants' petition for review of the NASD's disciplinary action, settlement of transactions with other broker-dealers had not been reached. Under the circumstances, we do not find it necessary to make any findings with respect to these contentions.

- ^{17/} Indeed, Contemporary and two of its principals were sanctioned by the NASD in this proceeding based on Contemporary's failure to accept the 200 shares of Crystallography from Muir.
- ^{18/} Nor are we holding that a broker-dealer failing to consummate a transaction based on a suspicion of fraud must necessarily have supporting evidence which would be sufficient to convince us or a court of law that the trade really was tainted with fraud. But the broker-dealer must take such reasonable measures as are appropriate under the circumstances.
- ^{19/} See Charters & Co. of Miami, 43 S.E.C. 175, 178 (1966), where we held: "The burden of establishing a justification for the firm's failure to honor ... transactions rested on the applicant firm. It failed to carry the burden."
- ^{20/} Joseph Buchman testified that, after termination of the Crystallography suspension, his attorney "told me not to discuss anything with the parties. I went along with his advice." While reliance on advice of counsel does not preclude a finding of violation, we think it should be given some weight in assessing the appropriateness of the NASD's sanctions against Joseph Buchman. Cf. Boren & Co., 40 S.E.C. 217, 228-229 (1960).

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With respect to Sidney Buchman, we are unable to conclude that the \$500 fine imposed by the NASD is excessive. 21/ Sidney Buchman was a vice president and a director of Shaskan, and was aware, from at least May 18, 1973, of Shaskan's failure to accept delivery of the Crystalography shares. He was also involved in the decision to purchase Crystalography shares in the open market in June 1973. Thus, we agree with the NASD's finding that, in view of his position with the firm, he had some degree of responsibility for resolving the problems arising from the uncompleted transaction with complainants, once he was aware of the situation. 22/

The record is inconclusive with respect to the culpability of Meyer Buchman. The NASD's imposition of a penalty against him appears to have been based primarily on the responsibilities attendant on his position as president and chairman of the board of Shaskan. There is no clear evidence that he had knowledge of Shaskan's Crystalography transaction with complainants. 23/ On the present state of the record, we are constrained to set aside the NASD's action against Meyer Buchman on the ground that it is not supported by sufficient evidence. 24/

Accordingly, IT IS ORDERED that the disciplinary action taken by the NASD against Shaskan & Co., Inc. and Sidney Buchman be, and it hereby is, affirmed; that the disciplinary action taken by the NASD against Joseph Buchman be, and it hereby is, modified as set forth above; and that the disciplinary action taken by the NASD against Meyer Buchman be, and it hereby is, set aside. The NASD's assessment of costs is set aside with respect to Meyer Buchman. Otherwise that assessment is affirmed.

By the Commission (Chairman HILLS and Commissioners LOOMIS AND EVANS);
Commissioner POLLACK not participating.

George A. Fitzsimmons
George A. Fitzsimmons
Secretary

21/ In view of the relative amounts of the fines imposed, we do not regard this as inconsistent with our conclusion that the fine imposed on Joseph Buchman should be reduced.

22/ We also believe that the NASD's ten-day suspension of Shaskan's membership is not excessive. However, that question has become moot by virtue of our revocation of Shaskan's broker-dealer registration based upon conduct unrelated to the transactions involved in this proceeding. Securities Exchange Act Release No. 11284 (March 10, 1975), 6 SEC Docket 424.

23/ Applicants were rather unclear about Meyer Buchman's specific duties with Shaskan. But we see no reason to reject Joseph Buchman's uncontroverted testimony that Meyer had no decision-making functions with respect to the Crystalography matter.

24/ We have held in a number of cases that the principal officer in a brokerage firm has a responsibility to, at least, exercise reasonable diligence to see that the firm is operated in conformity with applicable laws and rules. Consequently, he is not excused simply because he was unaware of the conduct in question. See Reynolds & Co., 39 S.E.C. 902, 916 (1960); Sutro Bros. & Co., 41 S.E.C. 443, 463 (1963); Dunhill Securities Corporation, 44 S.E.C. 472, 476 (1971). But the present situation is distinguishable in that it involved, essentially, a single trade for which another principal assumed responsibility.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
DISTRICT BUSINESS CONDUCT COMMITTEE
FOR DISTRICT NO. 12
COMPLAINT NOS. NY-1781, NY-1783 & NY-1784

Torpie & Saltzman, Inc., Member
39 Broadway
New York, New York 10006

Complainant

vs.

John Muir & Co., Member
39 Broadway
New York, New York 10006

and

Shaskan & Co., Inc., Member
16 Beaver Street
New York, New York

and

Meyer Buchman
Joseph Buchman
Sidney Buchman
Victor Zrike
Stanley Bartels, Registered Principals

and

Contemporary Securities Corp., Member
26 Beaver Street
New York, New York 10004

and

Jeffrey Greenberg
Abraham Pardes, Registered Principals

Respondents

DECISION

DATED: June 28, 1974

COMPLAINT NO.
NY- 1781

Complaint Nos. NY-1781
NY-1783
NY-1784

John Muir & Co., Member
39 Broadway
New York, New York 10006

Complainant

vs.

Shaskan & Co., Inc., Member
16 Beaver Street
New York, New York

and

Meyer Buchman
Joseph Buchman
Sidney Buchman
Victor Zrike
Stanley Bartels, Registered Principals

Respondents

DECISION

DATED: June 28, 1974

COMPLAINT NO.
NY-1783

John Muir & Co., Member
39 Broadway
New York, New York 10006

Complainant

vs.

Contemporary Securities Corp., Member
26 Beaver Street
New York, New York 10004

and

Jeffrey Greenberg
Abraham Pardes, Registered Principals

Respondents

DECISION

DATED: June 28, 1974

COMPLAINT NO.
NY-1784

Following the filing of Complaints by member firms, Torpie & Saltzman, Inc. ("Torpie") and John Muir & Co. ("Muir"), under dates of August 10, 1973, August 13, 1973 and August 13, 1973, respectively, a determination was made to consolidate the three Complaints into one proceeding on the basis of the close relationship of the transactions involved. Notice of the Complaints was mailed to all respondents and each filed an Answer with the Association responding to the charges and, except for respondents Contemporary Securities Corp. ("Contemporary"), Abraham D. Pardes, and Jeffrey M. Greenberg, requesting a hearing thereon.

Accordingly, a hearing was scheduled for April 3, 1974 and a Subcommittee of the District Business Conduct Committee heard testimony and received documentation relating to the charges on that date. Respondents Pardes and Zrike were the only parties to the proceeding who were neither present, nor represented by counsel.

As insufficient time was available to complete the proceedings, the Subcommittee adjourned to a future date and later reconvened on May 15, 1974. As before, separate Notices of Hearing were sent to each of the named parties and, as before, evidence was introduced which demonstrated either that due notice of the time and place of the hearing had been received by absent parties or that all reasonable measures had been taken to contact them. Once again, respondents Zrike and Pardes neither attended, nor sent representatives. In addition, no person appeared on behalf of respondents Greenberg or Contemporary. Counsel and a principal of the firm appeared at both hearings for complainant Torpie, and two representatives from Muir were present for that complainant - respondent. Sidney R. Buchman was the only individually-named respondent from Shaskan & Co., Inc. ("Shaskan") who attended the proceedings, but all Shaskan parties, except Mr. Zrike, were represented by an attorney.

Upon review and consideration at an assembled meeting, the District Business Conduct Committee finds and determines as follows:

COMPLAINT NO. NY-1781

The Complaint filed by Torpie, as it relates to Muir, charges that Torpie sold Muir 500 shares of Crystalography Corporation common stock ("Crystalography ") for an aggregate price of \$5,168.75 on October 5, 1972. Subsequent to this date, but prior to the settlement date, the Securities and Exchange Commission suspended trading in Crystalography. When Torpie tendered the 500 shares to Muir, at periods both before and after the lifting of the suspension, Muir refused to accept delivery and to pay for the 500 shares.

Torpie alleges further that Muir, prior to the suspension of trading in Crystalography, sold 300 shares to Shaskan and 200 shares to Contemporary, that Shaskan purchased the 200 shares from Contemporary, and that Shaskan thereafter refused to accept delivery of any of the 500 shares emanating from Torpie. The Complaint also asserts that Shaskan purchased shares of Crystalography, after the termination of the trading suspension, at a depressed price of approximately \$.50 per share and made delivery on purchases executed for customers just prior to the imposition of the trading suspension, when the market price was between \$10 to \$12 per share.

COMPLAINT NOS. NY-1783 & NY-1784

Muir's Complaints against Shaskan and Contemporary and the registered principals thereof, Complaint Nos. NY-1783 and NY-1784, allege the existence of the fails to deliver of 300 and 200 shares, respectively, referred to in the

Torpie Complaint. As to Shaskan, Muir asserts that, prior to the former's liquidation, delivery was tendered and refused. Once liquidation had commenced, further attempts to consummate the transaction were to no avail, even though Shaskan was honoring contracts in securities other than Crystalography. Attempts to deliver to Contemporary or, after its liquidation, to one of its principals, Jeffrey Greenberg, were either rebuffed or evaded, according to the Complaint.

THE ANSWERS

As a respondent named in Complaint No. NY-1781, Muir submitted an Answer indicating that their participation in the pertinent transactions was as agent for Torpie, not as a dealer, and that, having failed in several attempts to effect delivery to Shaskan and Contemporary, Muir should not be obligated to complete the transaction as to its customer, Torpie.

Muir claims to have fulfilled its duty as broker by tendering delivery, and states that it stands ready to accept Torpie's shares when and if Shaskan and Contemporary accept and pay for the shares sold to them. Shaskan has refused delivery, both during and after the suspension period, on the basis of caveats to brokers contained in SEC Release 34-7920, relating to transactions in suspended securities. Contemporary, though in liquidation at the time of tender of delivery, had represented that it would honor outstanding contracts, yet delivery efforts were rejected and evaded, according to Muir's Answer.

Respondent Shaskan submitted two Answers jointly with its five registered principals in individual response to the two Complaints. With respect to Complaint No. NY-1781, Shaskan objects to Torpie's standing as a complainant, as it denies ever having executed a securities transaction with that firm in the common stock of Crystalography. Delivery of all shares of Crystalography was refused on the advice of counsel and in reliance on applicable SEC Releases. Shaskan also denies that it has ever sold any shares of Crystalography to the firm's customers, and submits that the open market purchases made in Crystalography subsequent to the lifting of the trading suspension were executed at the insistence of the New York Stock Exchange.

Shaskan's Answer to Muir's Complaint, Complaint No. NY-1783, states simply that delivery of shares of Crystalography was refused on the advice of counsel and on applicable SEC Releases.

Respondents Pardes and Greenberg submitted separate Answers, Mr. Pardes responding for Contemporary and himself, but their Answers were identical in substance and spoke to both Complaint Nos. NY-1781 and NY-1784. Contemporary states that, while it has an outstanding contract to purchase 200 shares of Crystalography from Muir, it has an offsetting contract of sale with Shaskan, on which Shaskan has refused delivery. When Shaskan honors its contract, Contemporary asserts that it will accept delivery and pay for the shares purchased from Muir.

BACKGROUND

Muir (John) & Co. has been a member of this Association since April, 1955, and is also a member of the New York Stock Exchange and an associate member of the American Stock Exchange. The firm's business almost exclusively involves agency orders and listed securities comprise approximately 90% of its transactional volume. Muir has not been the subject of any prior disciplinary action by this Association.

Shaskan & Co., Inc. became a member of the Association in September, 1940 under the name of Shaskan & Co. The firm's name was changed to reflect its corporate status in June, 1965. While in business, Shaskan operated as a primarily retail enterprise, with less than 15% of its business involving professional trading, and maintained memberships on the New York and American Stock Exchanges.

In July, 1973 Shaskan agreed, at the instance of the Securities and Exchange Commission, to an order of self-liquidation and to a permanent injunction against the firm and Joseph Buchman, its Vice-President and Secretary, for violations of the hypothecation, customer protection, net capital, and supplemental notification requirements. During the same month, the Commission announced the institution of public proceedings against a number of broker-dealers and individuals, including Shaskan and Sidney R. Buchman, for alleged violations of the anti-fraud and other provisions of the federal securities laws in connection with the offering and after-market trading of Logos Development Corp. stock. At this time, there has been no final disposition of these proceedings against the two named respondents.

Meyer Buchman first registered with the Association as a sales representative with Shaskan in January, 1946 and three years later became an officer of the firm. At the time of the events alleged in the Complaints, Mr. Buchman was Shaskan's President and Chairman of the Board of Directors. After the liquidation of Shaskan, he became a salesman for an Exchange member. Mr. Buchman has no previous history of disciplinary actions by the Association.

Joseph H. Buchman first joined Shaskan in 1961 as a sales representative and later became its Vice-President and Secretary. His responsibilities, according to testimony from respondent Sidney Buchman, included generally supervising the overall operation of the firm and acting as a director thereof. As mentioned above, Mr. Buchman is the subject of a permanent injunction ordered in July, 1973, enjoining him from further violations of the securities laws. Since the demise of Shaskan, he has not become registered again with the Association.

Sidney R. Buchman joined Shaskan in March, 1958, according to the Association's records, and later became Vice-President and Manager of the trading department. He also held a seat on the firm's Board of Directors. As noted previously, Mr. Buchman was named by the Commission in public proceedings in July, 1973 for alleged anti-fraud violations in connection with Logos Development Corp. common stock.

Stanley L. Bartels worked in the securities industry for some five years before entering Shaskan, first as a sales representative in 1966, and later as a Vice-President and Director of the firm. In July, 1973, Mr. Bartels became a registered representative with a New York Stock Exchange member firm and, in March, 1974, he assumed responsibilities as a registered principal of that member. Mr. Bartels has not been the subject of any prior disciplinary action by the Association.

Victor Zrike first entered the securities business as the head of his own firm, V. Zrike & Co., Inc., in 1946. He became an officer of Shaskan in December, 1950 and, at the time of the events alleged in the Complaints, was a Vice-President and Director of the firm. Mr. Zrike has not been the subject of any prior disciplinary action by the Association.

Contemporary Securities Corporation first gained membership in the Association in December, 1969 through its predecessor firm, Abraham Pardes Co. The latter firm remained inactive through almost the entire period leading up to the change of name to Contemporary in July, 1971. Subsequently, the member engaged in a general securities business, making markets in several securities and operating on a primarily retail basis.

During its existence, Contemporary became the subject of disciplinary action by the Association on three occasions, all in connection with NASDAQ volume reporting violations. In early 1973, it began a process of liquidation and is today no longer engaging in a securities business.

Abraham D. Pardes first became registered with the Association when he started Abraham Pardes Co., the predecessor firm of Contemporary, in 1969. In March, 1973, following Contemporary's liquidation, Mr. Pardes worked as a sales representative for London Securities, Ltd. and, several months later, obtained a position with Saxon Securities. He has not re-registered with the Association since the termination of his registration with Saxon later in 1973. The Association has not previously taken any disciplinary action against this individual.

Jeffrey M. Greenberg became registered as a principal of Contemporary in December, 1972, after serving as a sales representative with the firm for a three-month period and with various other members since 1968. After Contemporary closed, Mr. Greenberg gained employment as a registered representative for one year and is presently out of the securities business. He has not been the subject of previous disciplinary action by the Association.

FACTS, FINDINGS AND CONCLUSIONS

The conclusions reached by this Committee in considering the Complaints before us are based upon a careful review of extensive testimony and documentation presented at two hearing sessions and pertain to the charges set forth in each of the Complaints. For purposes of this Decision, then, the three subject Complaints are to be considered as one and joined.

The charges lodged are of serious import and relate to a topic of great significance to the securities community, i.e., the nature of a member's ethical

obligation to honor a contractual commitment. The issue is often cast, as here, in the situation where a security, concerning which several broker-dealers have open contractual commitments, is suspended from trading by the Securities and Exchange Commission prior to settlement date for reasons relating to the possible existence of fraudulent or manipulative practices in the trading of the security. Under these circumstances, the receiving broker-dealer's usual obligation to honor his contractual commitments is often counterpoised, and in proper cases outweighed, by his duty to avoid effecting transactions which would result in the perpetuation of a fraud and a violation of securities laws.

In the instant proceeding, the complainants alleged, and evidenced by the introduction of comparisons and confirmations, that Torpie sold 300 shares of Crystalography through Muir for delivery to Shaskan and 200 shares through Muir to Contemporary, all on October 5, 1972. On October 11, 1972, the Commission halted all trading in Crystalography because of the precipitous decline in the price of the common stock over the course of the several days previous.

According to testimony adduced at hearing, Torpie delivered the 500 shares of Crystalography to Muir during the suspension period and Muir made telephone calls to discover whether delivery would be accepted by Shaskan and Contemporary. The indications received at that time were that delivery would be refused. Evidently, certain of the parties involved believed that the suspension on trading also prohibited the acceptance of delivery on open contracts during the period of suspension. Counsel for Shaskan pressed this viewpoint repeatedly at hearing. While we disagree with this position, it is important here to note simply that Muir did not make a physical attempt to deliver the shares sold by Torpie until the termination of the Commission's suspension on May 18, 1973.

On that date, Muir made delivery of the 300 shares sold to Shaskan and delivery was refused in accordance with a written reply that Shaskan was not accepting trades of Crystalography pending Commission clarification of its findings and of the obligations of broker-dealers with respect to open contracts in Crystalography. Physical delivery of the 200 shares sold to Contemporary was more difficult as the latter firm had been liquidated during the suspension period. Muir claims that, when repeated attempts to contact respondent Pardes failed, Mr. Greenberg was located and he advised Muir to make delivery to an account at Evans & Co., Inc. Muir states that this was done and delivery was declined. Mr. Greenberg, during his presence at the hearings, did not deny this assertion.

As the obligation of a receiving broker-dealer to honor his contractual commitment to pay for stock purchases does not ripen prior to a physical tender by the delivering broker-dealer, we do not believe that any violation of the Association's Rules of Fair Practice was committed by the receiving respondents prior to the occurrence of this event. It seems apparent to us that, absent concerted efforts to avoid a tender of securities, the ethical issues raised in this proceeding, as against Shaskan and Contemporary, do not become manifest until after Muir has proved itself ready, willing, and able to complete the trade. Based upon a review of the record, the prerequisite of a physical tender did not first occur in the instant case until the end of the trading suspension period, May 18, 1973. Any Rule violations which might have occurred could not have arisen until this time.

The question as to the scope of a broker-dealer's obligations in completing a transaction when the possibility of fraud or manipulation might taint the trade has been the subject of a number of SEC Releases over the years. These releases have been issued both pursuant to disciplinary proceedings reviewed by the Commission and in response to questions presented by representatives of the broker-dealer community. In an effort to distill from these pronouncements some significant points to guide members in their transactions in suspended securities, the Association issued a Notice to Members, dated December 27, 1972, summarizing the relevant releases and analyzing their common rationale.

While the Association will not engage in deciding the legal rights of parties in a contractual dispute, it has been determined that the failure to complete a contract, absent some equitable excuse or justification, violates the member's obligation to observe high standards of commercial honor and just and equitable principles of trade. In order for a breach of contract to violate the Association's Rules, the breach must proceed from dishonorable or unethical conduct. As a failure to perform on a valid contract raises the possibility of such conduct, it is necessary to establish whether the broker-dealer refusing to pay for or deliver suspended securities pursuant to an open contract honestly believed, and had a reasonable basis for believing, that to consummate the transaction would perpetuate and further a fraudulent scheme. Whether or not such a broker-dealer did, indeed, have a "reasonable basis" for his beliefs is a factual question and one with which this Committee was deeply concerned in making a determination as to the conduct of respondent Shaskan and its registered principals.

Shaskan's defense in this regard, stated simply, was that the firm relied upon its interpretation of several Commission releases in refusing delivery and that it was unable to assure itself that it would not be furthering a fraudulent scheme by consummating any trades in Crystallography. This latter position derives from language in the Commission release which terminated the Crystallography trading suspension, SEC Release 34-10156. Therein, the Commission admonished broker-dealers to "take the necessary measures to assure themselves" of the untainted nature of an open contract in Crystallography before consummating the transaction. Shaskan maintained that, upon tender of delivery by Muir on May 18, 1973, it had not assured itself adequately as to any of its open contracts in Crystallography. Counsel for the firm that day wrote to the Commission for clarification as to what "necessary measures" should be taken to gain assurance. The firm waited one month for a reply, which arrived under date of June 19, 1973. At about this approximate time, Shaskan's troubled operations fell under the watchful supervision of the New York Stock Exchange and, then, under the control of the Federal courts in mid-July, pursuant to an order consenting to self-liquidation. Shaskan argues, then, that it acted immediately to clarify its responsibilities, that it did not wish to consummate any Crystallography transactions in the interim for fear of violating federal securities laws, and that, by the time it had any clarification as to the definition of "necessary measures," control of its operations had effectively passed out of its hands.

Respondent Shaskan did not argue, however, that any of the parties involved in the transactions were part of a manipulative scheme, nor did it state that, at any time, it believed this to be the case. That the firm refused delivery

on Crystalography trades generally, as a matter of policy during the subject period, adds strength to the inference that it saw nothing wrong with the Torpie transactions in particular. There was no indication from Sidney Buchman, the Manager of Shaskan's trading department, that he ever heard rumors from other traders implicating Torpie, Muir, or Contemporary in alleged manipulative schemes. Muir claims to have conducted its own investigations into the integrity of the sales of Crystalography made for customer Torpie and to have satisfied itself that the transactions were not tainted. Shaskan, however, never requested this action of Muir, it never requested assurances from Muir that Muir's customer was free from fraudulent involvement, and it does not seem to have suspected, or conducted any investigations into, the possible involvement of its own customers. In view of the fact that Meyer and Joseph Buchman, the persons responsible, according to testimony, for the decision not to accept deliveries on the subject contracts, did not attend the hearing to testify before the Committee, we are constrained to conclude that counsel for Shaskan and respondent Sidney Buchman provided us with all the material elements which combined to form the respondent member's position.

This Committee cannot accept respondent Shaskan's interpretation of a broker-dealer's responsibility in completing transactions in suspended securities as a negative, subjective duty merely to suspend consummation if it cannot assure itself that the transaction is not part of a fraudulent scheme. We feel the thrust of the broker-dealer's obligation must be toward the completion of a trade, and that the ethical propriety of a determination to act contrarily must be measured by some objective standard, such as a "reasonable basis." This, it seems to us, is absolutely necessary if the sanctity of the contractual commitment of a broker-dealer is to be preserved.

Accordingly, we believe that respondent Shaskan had a duty, upon refusing delivery by Muir, to act affirmatively and quickly to establish whether there were reasonable grounds for continuing to refuse. Dispatching a letter to the Commission asking for clarification of language in its releases was simply not sufficient to justify a lengthy suspension of its contractual obligations. We have indicated hereinbefore some steps Shaskan might have taken. Certainly, some good faith discussions with Muir concerning the subject transactions would have been appropriate. A phone call to the Commission, instead of a letter, might have brought a quick response, if speed were truly Shaskan's primary concern. In any case, some action after receiving the Commission's letter of June 19 was mandated, yet Shaskan admits its failure to act upon the Commission's recommendations.

As it was, Shaskan simply posted its letter, albeit immediately upon refusing delivery, waited a month for an answer, and did not, thereafter, follow any of the suggested procedures contained in the Commission's reply. Moreover, during the period following the termination of the Crystalography trading suspension, Shaskan purchased shares of Crystalography in the open market for delivery to accounts evidencing purchases executed prior to the suspension. Clearly, some of these transactions were those for which the commitments to Muir and Contemporary had been made. This action by Shaskan, though pursuant to an Exchange request that customer affairs be cleared up at the firm, manifested an overt negation of

its obligations to the broker-dealer with whom it had commitments, without, we think, a reasonable basis for doing so.

Respondent Shaskan offered one further defense to the Complaints involved in this proceeding. Introducing evidence at hearing to demonstrate that the subject transactions had been executed by Pohs, Levy & Co., for whom the respondent member was clearing on a disclosed basis, Shaskan argued that the customers who had purchased the Crystalography shares were not theirs, but Pohs, Levy's. Since Pohs, Levy had ceased operations prior to Muir's delivery, Shaskan did not accept an obligation to complete its outstanding contracts. In light of all the surrounding circumstances, this argument by Shaskan seems specious, for, in all other regards, the respondent firm has recognized the customers of Pohs, Levy as its own.

That Shaskan delivered Crystalography shares to the holders of these accounts after the suspension was lifted demonstrates that the firm adopted responsibility for trades executed originally by Pohs, Levy. In completing these trades for customers, Shaskan also indicates, to some extent, that it found no reason to suspect fraudulent activities on the part of these customers which might have tainted the Torpie transactions.

Shaskan's clearing agreement with Pohs, Levy caused Shaskan to accept the responsibility for the proper completion of transactions executed for customers by Pohs, Levy. For most purposes, and specifically for purposes of determining responsibility for honoring or failing to honor a contractual commitment, the discretion to act for the customer and the corresponding ethical duty to act properly belong to Shaskan. In such instances, the Pohs, Levy customer must be considered Shaskan's customer.

We have reviewed the evidence presented at hearing with care and have determined that the respondent member, Shaskan & Co., Inc. was responsible for accepting delivery on the subject transactions, and that its refusal to do so was without equitable excuse or justification. Shaskan's reliance on the possible existence of fraud as justification for its actions may have been in good faith, but such reliance was poorly grounded in law and without a reasonable basis in fact. We find that respondent Shaskan acted in a manner inconsistent with just and equitable principles of trade and, in so doing, violated Article III, Section 1 of the Rules of Fair Practice of this Association.

As to the individual Shaskan principals charged in these Complaints, we have examined the responsibilities of each person while employed at the firm to discover the extent of his participation in determining Shaskan's policy on the Crystalography trades or his involvement in effecting that policy. The determination to refuse delivery was evidently not a matter of discussion at a meeting of the Board of Directors, so that all five registered principals, as directors, did not necessarily breach an ethical obligation. Meyer and Joseph Buchman, as the heads of the firm and the individuals responsible for overall operations and business policy, were the likely officers to make the decision referred to, and the testimony adduced at hearing supports this view. We have found inadequate support for the view adopted by these two gentlemen and no evidence of any good faith attempts to foster the satisfactory completion of the subject transactions.

Sidney Buchman was first informed of the refusal policy after the fact when he was called into a conference to discuss the need to purchase Crystalography shares on the open market for delivery to customers. While he was the head of the firm's trading department, Mr. Buchman made it clear at hearing that, since the trade was executed by Pohs, Levy initially, the transaction would be communicated directly to the back office without his gaining knowledge of it. Sidney Buchman, then, was not involved in the formulation of Shaskan's refusal policy. However, for participating in the decision to purchase Crystalography on the open market, rather than encouraging the completion of the open contracts, and for not actively seeking, as a principal of the firm, to ascertain the fraudulent or nonfraudulent nature of the Torpie transactions when apprised of the situation, Sidney Buchman must accept, we feel, some of the responsibility for the respondent member's actions.

Mr. Bartels and Mr. Zrike, according to all the evidence, had no part in the formulation or exercise of the refusal policy, and bore responsibility for areas unrelated to the operations or trading departments at Shaskan. Mr. Bartels worked chiefly in the area of syndications and underwriting, while Mr. Zrike operated primarily in retail sales.

After due consideration, the Committee has determined to dismiss those charges which relate to respondents Bartels and Zrike. We do find, however, that respondents Meyer, Joseph, and Sidney R. Buchman committed violations of Article III, Section 1 of the Association's Rules and that their conduct was inconsistent with just and equitable principles of trade.

Respondent member Contemporary and its registered principals presented only a partial defense at hearing, but, relying upon this and the answers submitted by these respondents, we are able to perceive no equitable justification for Contemporary's actions in refusing to complete its contractual commitments with Muir. Delivery seems to have been refused for no reason other than the fact that Shaskan refused delivery on a 200 share sale made by Contemporary to Pohs, Levy, clearing through Shaskan. Such an excuse is definitely insufficient to relieve this member of its ethical obligation.

Respondents Pardes and Greenberg were the sole registered principals of Contemporary and were each aware of the situation with regard to the subject transactions. We are satisfied that each participated in the decision to refuse delivery and should share the responsibility for the consequences of that decision. Accordingly, we find that respondents Contemporary Securities Corporation, Abraham D. Pardes, and Jeffrey M. Greenberg acted in a manner inconsistent with just and equitable principles of trade and thereby violated Article III, Section 1 of the Rules of Fair Practice.

Respondent Muir's involvement in the chain of transactions which has resulted in this proceeding has been as agent for its customer, Torpie. We do not believe that, as Torpie's broker, Muir was obligated to pay for shares involved in a trade upon which a contra-broker or dealer and reneged. There existed no purchase contract between Muir and Torpie, only an agreement that Muir would act for Torpie in selling the 500 shares of Crystalography.

Muir's responsibilities as Torpie's broker seem to have been adequately acquitted. It presented the shares for delivery in proper form and made numerous other efforts to contact contra-parties to effect a completion of the transactions. Upon learning of the suspension in Crystalography, Muir satisfied itself that the transaction effected for Torpie was not tainted by fraud, and it, therefore, stood ready to give assurances to Contemporary and Shaskan, had they been requested. We find no evidence of Rule violations in Muir's actions and we, therefore, dismiss Complaint No. NY-1781 as to that respondent firm.

PENALTY

Based upon the foregoing, it is the Decision of this Committee that the following sanctions be imposed:

- a) that respondent Shaskan & Co., Inc. be censured and suspended from membership in the Association for a period of ten (10) days;
- b) that respondent Meyer Buchman be censured and fined in the amount of \$2,000;
- c) that respondent Joseph Buchman be censured and fined in the amount of \$2,000;
- d) that respondent Sidney R. Buchman be censured and fined in the amount of \$500;
- e) that respondent Contemporary Securities Corporation be censured and suspended from membership in the Association for a period of ten (10) days;
- f) that respondent Abraham D. Pardes be censured and fined in the amount of \$1,000;
- g) that respondent Jeffrey M. Greenberg be censured and fined in the amount of \$1,000; and
- h) that respondent, Meyer Buchman, Joseph Buchman, Sidney R. Buchman, Abraham D. Pardes, and Jeffrey M. Greenberg be assessed, in five equal portions, the costs of this proceeding in the amount of \$625.49.

DISTRICT BUSINESS CONDUCT COMMITTEE
FOR DISTRICT NO. 12

BY: 

For the Committee

BEFORE THE BOARD OF GOVERNORS

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of

Torpie & Saltzman, Inc., Member
39 Broadway
New York, New York 10006

Complainant

vs.

John Muir & Co., Member
39 Broadway
New York, New York 10006

and

Shaskan & Co., Inc., Member
16 Beaver Street
New York, New York

and

Meyer Buchman
Joseph Buchman
Sidney Buchman
Victor Zrike
Stanley Bartels, Registered Principals

and

Contemporary Securities Corp., Member
26 Beaver Street
New York, New York 10004

and

Jeffrey Greenberg
Abraham Pardes, Registered Principals

Respondents

DECISION

Complaint Nos. NY-1781,
NY-1783 & NY-1784

District No. 12

April 30, 1975

This matter was appealed to the Board of Governors pursuant to the provisions of Section 15 of the Association's Code of Procedure for Handling Trade Practice Complaints. In a Decision of District Business Conduct Committee for District No. 12, dated June 28, 1974, respondent Shaskan & Co., a member, New York, New York, was censured and suspended from membership in the Association for a period of ten days; respondents Meyer Buchman and Joseph Buchman, registered principals, were each censured and each fined \$2,000; respondent Sidney R. Buchman, a registered principal, was censured and fined \$500; respondent Contemporary Securities Corporation, a member, New York, New York, was censured and suspended from membership in the Association for a period of ten days; respondents Abraham D. Pardes and respondent Jeffrey M. Greenberg, registered principals, were each censured and each fined \$1,000; and respondents Meyer Buchman, Joseph Buchman, Sidney R. Buchman, Abraham D. Pardes and Jeffrey M. Greenberg were assessed, in five equal parts, the costs of this proceeding in the amount of \$625.49. The District Committee dismissed the allegations as they related to Victor Zrike, Stanley Bartels and John Muir & Co.

The District Committee found that Torpie & Saltzman, Inc., a member, New York, New York, had sold, on October 5, 1972, through John Muir & Co. 300 shares of Crystalography Corporation common stock for delivery to Shaskan & Co. and 200 shares of the same stock for delivery to Contemporary Securities Corporation. The Committee found that the Securities and Exchange Commission had halted trading in Crystalography on October 11, 1972, and that Contemporary and Shaskan thereafter refused delivery. It also found that violations for their refusal would not arise until Muir & Co. physically attempted to deliver the stock to them on May 18, 1973, the same day that the Crystalography trading suspension ended.

The District Committee found that Shaskan & Co., Inc. was responsible for not accepting delivery on the subject transactions, and that its failure to do so was without equitable excuse or justification. Furthermore, the Committee found that Shaskan's reliance on possible fraud as a justification for its refusal may have been in good faith, but that this reliance was without a legal or factual basis. It also found that Shaskan made inadequate attempts to clarify its position by a letter to the SEC, in that Shaskan was under an affirmative obligation to quickly establish if reasonable grounds existed for refusing tender of the stock. The Committee additionally found Meyer and Joseph Buchman, as heads of the firm and the individuals responsible for overall operations and business policy, responsible for Shaskan's failure to accept delivery on the transactions involved. It also found Sidney Buchman, head of the firm's trading department, responsible for the firm's refusal to accept delivery of the stock in that he participated in the decision to purchase Crystalography on the open market

rather than encouraging the completion of the open contracts; and that he also failed to ascertain the validity of the charges of fraud surrounding the transaction. Additionally, the Committee found that respondent Contemporary Securities Corporation had unjustifiably failed to complete its contractual agreement with John Muir by refusing delivery of the Crystalography stock. In a similar vein, the Committee found respondents Pardes and Greenberg, as the sole registered principals of Contemporary, equally responsible for Contemporary's refusal to accept delivery. The Committee found the above conduct to be in violation of Article III, Section 1 of the Association's Rules of Fair Practice and inconsistent with just and equitable principles of trade and high standards of commercial honor. The Committee dismissed the complaint as it related to respondents John Muir & Co., Victor Zrike, and Stanley Bartels.

Respondents Contemporary Securities Corporation, Shaskan & Co., Inc., Meyer, Joseph and Sidney Buchman and Jeffrey Greenberg appealed the decision and it was subsequently called for review as to the remaining respondents pursuant to Section 15 of the Code of Procedure for Handling Trade Practice Complaints. A hearing on this matter was held before a Subcommittee of the Board of Governors on September 5, 1974, in the Association's New York City office. Present at the hearing were Sidney and Joseph Buchman, Mona Shields and Don Katz, representing the interests of John Muir & Co., Abraham Pardes and Jeffrey Greenberg. David Saltzman of Torpie and Saltzman, Inc. was also at the hearing as well as being represented by counsel.

At the hearing, Pardes stated that he felt that the fine imposed upon both himself and Greenberg was exorbitant at this particular time considering the present state of the securities industry. Pardes stated that the Crystalography Stock to be purchased from John Muir was to be offset by a contract of sales to Shaskan, on which Shaskan refused delivery. He further stated that he was unsuccessful in enlisting the help of the NASD or the SEC in delivery of the stock. Based on what they considered to be agency inaction by the SEC and NASD, Pardes and Greenberg contended that the fine imposed should be reduced to reflect the intermediary position played by Contemporary Securities. Greenberg stated that he unsuccessfully attempted to mitigate the situation by providing for Muir to bypass Contemporary and deal directly with Shaskan. Greenberg reiterated that the fines imposed upon himself and Pardes were too exorbitant under present market conditions. Pardes stated that Contemporary Securities commenced liquidation during November 1972 and substantially completed these activities, by the end of February or March 1973, and that he does not now possess another job in the securities industry. Greenberg stated that he is currently employed with Saxon Securities as an over-the-counter trader.

Joseph Buchman also testified at the hearing while concomitantly representing the interests of Shaskan, Meyer Buchman and Sidney Buchman. Buchman stated that on June 19, 1973, Shaskan was suspended by the NCC and the following morning by the New York Stock Exchange. He further stated that since June 20, 1973, Shaskan has not, upon direction by NCC, honored any contracts with brokers; that Shaskan has been winding up its affairs under the direction of the SEC since June 20, 1973 and has since that time had no control over its member's actions. Buchman proceeded to state that Shaskan's failure to meet its contracts did not involve any dishonorable or unethical conduct and that he further believed that he was involved in a manipulative scheme. Joseph Buchman further stated that he alone made the decision to not accept or make delivery in Crystalography and that the decision was a proper one. He additionally stated that his decision to purchase shares in the open market was done pursuant to a New York Stock Exchange request and order that all customer accounts be cleared up expeditiously. Similarly, he stated that he failed to use stock already present in the house due to its possible tainted nature and pending SEC clarification on Crystalography. Joseph Buchman went on to state that he felt that stock purchased in the open market would be cleaner but that he made no concerted effort to ascertain that such was in fact the case. Additionally, he felt that his belief in the fraudulent nature of the transaction was reinforced when Ron Martini, a customer of Pohs, Levy & Co.¹ was deemed a respondent in an SEC action regarding possible Crystalography manipulation.

Based upon the record as a whole, we believe that the findings of the District Business Conduct Committee should be affirmed. We feel that the respondents have failed to show that their actions were motivated by an honest fear of involvement in a fraudulent or manipulative scheme. No evidence adduced by respondents can support an objective determination on their part that manipulation was taking place. We also believe that a member's moral and commercial responsibility should be geared toward completion of contracts; and that a failure to do so, as in this case, has deleterious effects on the entire securities industry.

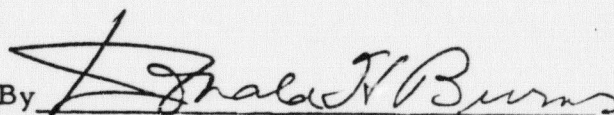
Where the individual respondents are concerned, we feel that Pardes' and Greenberg's attempts to complete the stock transaction are noteworthy, and

¹/ The transactions in question had been executed by Pohs, Levy & Co. for whom Shaskan was clearing on a fully disclosed basis. Shaskan argued that the purchasers were, therefore, actually customers of Pohs, Levy and not Shaskan. We agree with the District Committee this argument is specious.

while not condoning their actions in the least, we believe that their earnest efforts, as well as the financial predicament of their firm at the time should be considered. With respect to Joseph Buchman, we feel that the circumstances demonstrate that he was principally responsible for not accepting the delivery of the Crystalography stock, as well as the decision to purchase Crystalography on the open market. Where Meyer Buchman is concerned, we feel that his position as President and Chairman of the Board of Shaskan shoulders him with some overall responsibility for the acts involved. However, we feel that his limited participation in the decision resulting in non-acceptance of Crystalography warrants some consideration. Where Sidney Buchman is concerned, we feel that his position as head of the firm's trading department, as well as his participation in the purchase of Crystalography on the open market, give him some responsibility for the violative activities. However, we do acknowledge his ignorance of and non-involvement in Shaskan's initial decision to refuse delivery of the stock.

In view of the differing culpability for the acts involved, we believe that some modification of the penalties imposed is required. Accordingly, with respect to Pardes and Greenberg, we hereby reduce the penalties from \$1,000 to \$500 each. As to Meyer Buchman, we hereby reduce the penalty from \$2,000 to \$1,000. However, with respect to Sidney and Joseph Buchman, the penalties are hereby affirmed. Similarly, we affirm the penalties imposed upon Shaskan & Co. as well as Contemporary Securities Corporation and the District Committee's assessment of costs. The suspensions shall commence on a date to be set by the President of the Association.

On Behalf of the Board of Governors,

By 
Donald H. Burns, Secretary